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THE MERCHANDISE
MARKS ACT
1862.
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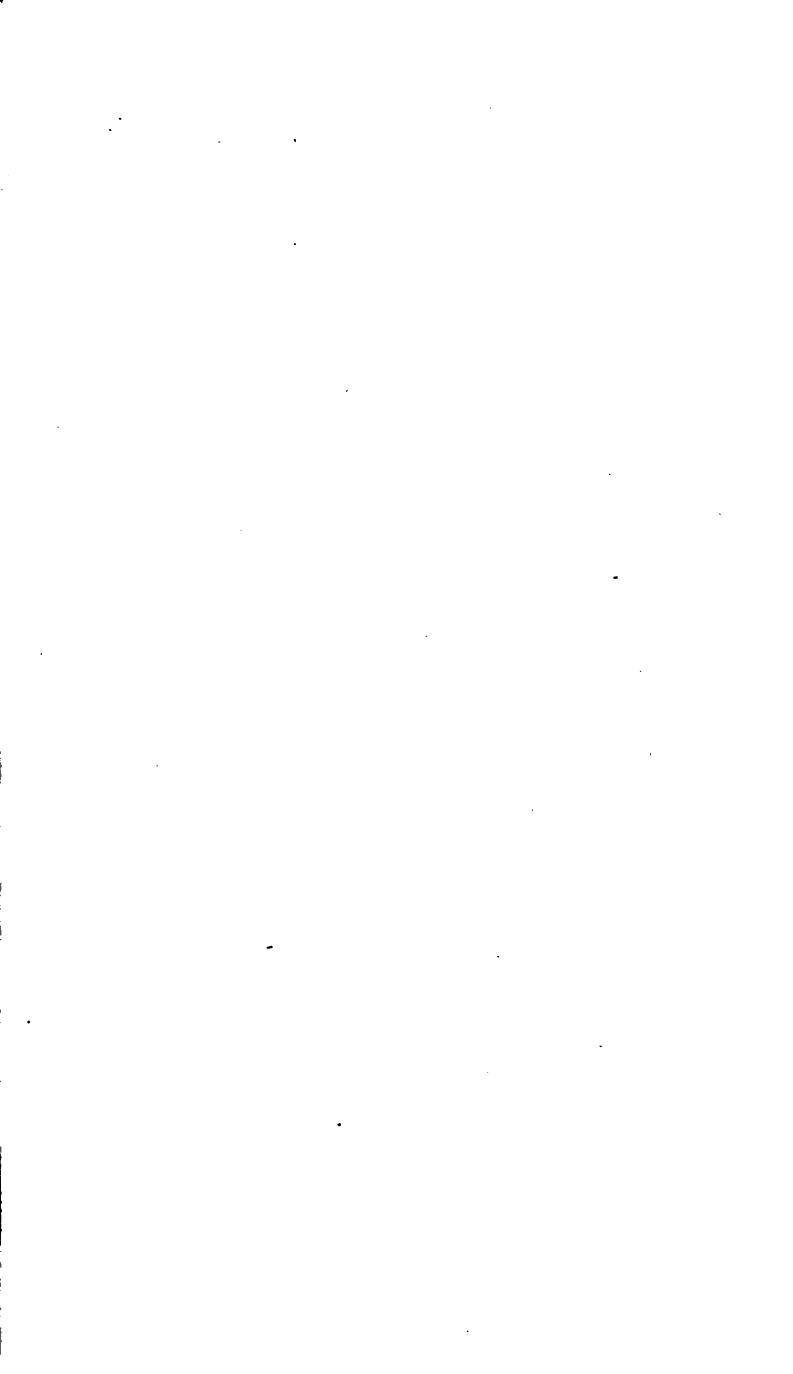
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P 762

TRADE MARKS.

THE MERCHANDISE MARKS ACT,

1862.

25 & 26 VICT. c. 88.

With Notes

BY

HARRY BODKIN POLAND, Esq.

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

"Caveat Venditor."



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SIR WILLIAM ATHERTON, KNT., M.P.,

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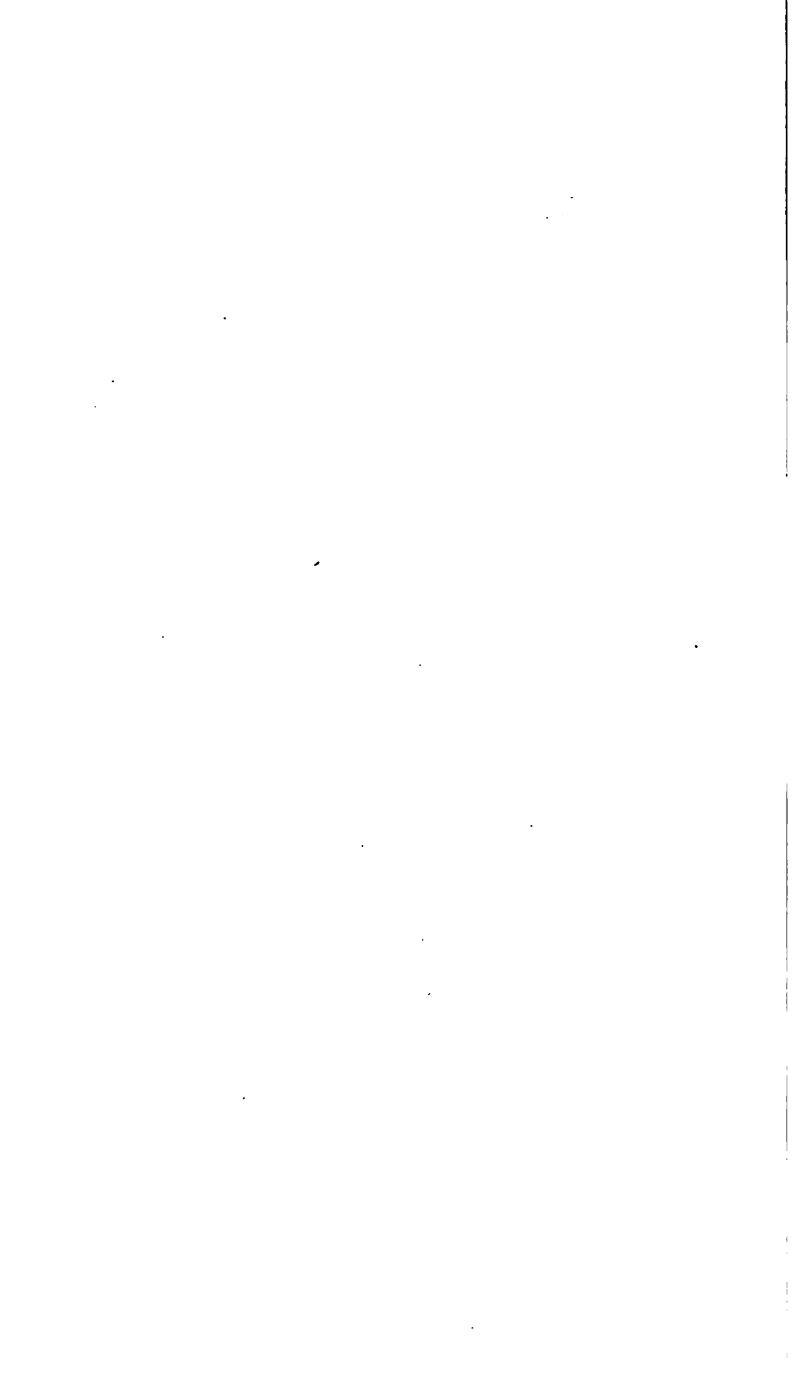
PRESIDENT OF THE BOARD OF TRADE,

THE PUBLIC

IS MAINLY INDEBTED FOR THE AMENDMENT

EFFECTED IN THE LAW BY

THIS ACT.



INTRODUCTION.

As this is the first general Act of Parliament "to amend the Law relating to the fraudulent marking of Merchandise," I hope the following introductory statement will not be considered out of place.

For years past it has been felt that the legislature must sooner or later interfere for the purpose of preventing the forgery of trade marks and the false marking of merchandise, but until 1860 it does not appear that any active measures were taken for removing the evils which were admitted on all hands to exist. In that year a draft of a bill was prepared at the instance of several of the Cham-

bers of Commerce, but was never introduced into Parliament, because it was found by those who had a practical knowledge of the subject that it would be impossible to carry out its provisions. About the same time Mr. Travers Smith, a solicitor, who had been for many years engaged by some of the leading manufacturers in suppressing the piracy of their trade marks, at the request of Mr. Bass, M.P. for Derby, prepared the sketch of a bill, which was submitted to Mr. Milner Gibson, President of the Board of Trade; and shortly after this a bill was prepared by the Government which embodied some of the suggestions contained in such sketch, as well as others which had from time to time been made on behalf of the manufacturers who had suffered from the piracy of their trade marks. This bill, entitled "An Act to amend the Law relating to the fraudulent Marking of Merchandise," was introduced into the House of Lords in February, 1861, by Lord Campbell, and was there read a third time, but was not carried through the House of Commons, as it was considered that some alterations could be made which would render it more effective.

In the present year another bill containing many fresh provisions, called the "Merchandise Marks Bill," was introduced into the House of Commons by Mr. Milner Gibson, President of the Board of Trade, and the Attorney-General (Sir William Atherton), on behalf of the Government; and in the same session a bill, called the "Trade Marks Bill," was also brought into the House of Commons by the members for Sheffield, Mr. Roebuck and Mr. Hadfield. Both these bills, with the various petitions relating to them, were referred to a select committee, consisting of the following members: Mr. Roebuck, Mr. Milner Gibson, Mr. Crum-Ewing, Sir Francis Goldsmid, the Attorney-General, Mr. Crossley, Sir Hugh Cairns, Mr. Selwyn, Mr. Alderman Copeland, Mr. Hassard, Mr. Warner, Mr. Potter, and Mr. Moffatt. It will be seen that the committee was composed of lawyers and mercantile men of great experience, and representing different interests. Both bills contained clauses for punishing persons forging trade marks or wrongfully using them, and summary powers were given to justices in many cases to deal with offenders. The main difference in the two bills was this, the "Trade Marks Bill" provided for the registration of trade

marks, and declared that when registered they should be considered the personal property of the person in whose name they were registered, and should be transmissible according to the ordinary rules of law affecting personal property, and also contained a special clause, framed in analogy to the act, to secure to authors in certain cases the benefit of international copyright (1 & 2 Vict. c. 59), on the principle that "commercially speaking the maker of a book and the maker of a knife, stand in the same position, and if the maker of a book is entitled to have legislative interference to protect his copyright, so is the maker of a knife or a file or a saw,"(a) whereas the "Merchandise Marks Bill" did not in any way provide for such registration or seek to create any property in a trade mark, nor had it any special international clause, but merely by the interpretation clause provided that the trade marks of all persons, whether subjects of Her Majesty or not, and of all Corporations and Companies, whether English or Foreign, and wherever carrying on business, should be protected by the bill.

(a) Minutes of Evidence, 31.

The Committee examined many witnesses. Mr. Hindmarch, Q.C., who drew the "Merchandise Marks Bill," and Mr. Travers Smith, in support of the Government bill:—in support of Mr. Roebuck's bill, Mr. William Smith, who drew the "Trade Marks Bill," Mr. L. Edmunds, clerk of the patents; Mr. George Wilkinson, Master Cutler, of the Cutlers' Company at Sheffield (which Company has been in the habit of registering the trade marks of all persons making cutlery in the liberty of Hallamshire since the reign of James the First), Mr. Bennet Woodcroft, superintendent of specifications in the Great Seal Patent Office, and a number of well-known manufacturers and traders, were examined. Various amendments were made in the "Merchandise Marks Bill" by the committee, and at their last meeting the chairman, Mr. Roebuck, moved "That a system of registration for trade marks be adopted in this bill." This was put and negatived. He also moved "That the principle of reciprocity with foreign nations be adopted in this bill." This was also negatived. The "Merchandise Marks Bill," as amended, was reported to the House, and, after a few other alterations were made in committee of the whole House, became law. The

"Trade Marks Bill" was reported to the House without amendment, and was subsequently dropped. The evidence taken before the committee will be found in a Blue Book, entitled "Report: Trade Marks Bill and Merchandise Marks Bill;" and a perusal of it will show that the interference of the Legislature was absolutely necessary; and will also show the difficulties which presented themselves in framing the present act.

Evidence was given to the committee to induce them to retain certain words in the Government bill, making it an offence for any person to imitate another's trade mark, or affix to any goods a false trade mark, &c., *without lawful excuse, the proof whereof should lie on the person accused*; and it was suggested that a less punishment might be imposed in such a case than where the intent to defraud was directly proved. (a) The committee, however, struck these words out. There is frequently a difficulty in proving to the satisfaction of a jury the *intent to defraud*, and that even in cases where a fraud has obviously been committed, and the retention of these words would certainly

(a) See Minutes of Evidence, 121.

have had a very beneficial effect in checking the frauds which this act is passed to prevent, and would not have been injurious to the honest trader. These words have over and over again been introduced into Acts of Parliament, (a) as they have been found absolutely necessary for the purpose of preventing frauds in cases where it is almost impossible for the prosecutor to *prove the intent to defraud*, and where, if innocent, the accused person can at once clear himself from the charge.

By the Criminal Law Consolidation Acts passed last year, power is given to justices to grant *search warrants* in a great number of cases of far less *importance than the piracy* of trade marks, and it would be a very valuable addition to this act if a similar power were to be given to justices to grant a warrant to search for forged trade marks, for articles falsely marked, and for instruments used for forging trade marks, &c., (b) on proof satisfying them of the necessity for so doing. The power

(a) See Minutes of Evidence, Appendix, No. 2.

(b) See Minutes of Evidence, 36, 93, 94, and 121, and 24 & 25 Vict. cc. 96, 98, 99, 100.

given by section 21 of this act to the court or a judge thereof, in a suit at law or in equity, to make an order for the *inspection* of any manufacture carried on by the defendant in which a forged trade mark is alleged to be used, and of every thing in the possession of the defendant alleged to have thereon a forged trade mark, or a trade mark wrongfully applied, and every instrument in the possession of the defendant capable of being used for making a forged trade mark, will, however, be of great benefit.

Some of the amendments made in the bill during its progress through Parliament (as too frequently happens in matters of legislation) are certainly not improvements on the measure as originally framed by the Government.

Making dies and instruments for forging trade marks, and being in possession of such articles without lawful excuse, ought surely to have been made misdemeanors, but are not so by the present act.

There appears to be an omission in the act with regard to the costs of a prosecution for misdemeanor. Where the plaintiff sues for a pecuniary penalty on behalf of Her Majesty

he can obtain his costs, and where a complainant takes summary proceedings before justices on behalf of Her Majesty, he can obtain his costs under Jervis's Act, 11 & 12 Vict. c. 43, but where a prosecutor indicts a man for a misdemeanor created by this act, also a proceeding on behalf of the Crown, he cannot get the costs incurred by him in bringing the offender to justice. The insertion of a short clause to the following effect would have remedied this defect: "In every prosecution for any misdemeanor against this act, the court before which any such offence shall be prosecuted or tried may allow the expenses of the prosecution, as in cases of felony."

The act is so short that a summary of its provisions is unnecessary. It will be noticed that sections 4, 6, 8, 19, and 20, do not take effect until after the 31st December, 1863. Particular attention should be directed to sect. 6, which enacts that any person who shall have sold, uttered, or exposed for sale an article having thereon a forged trade mark, &c., shall be bound upon demand in writing to give the person requiring the same, within forty-eight hours after such demand, full information in writing of the name and address of the

person from whom he shall have obtained such article, and of the time when he obtained the same, and that any justice of the peace may order such demand to be complied with. The section further enacts that any person who shall neglect to comply with such order shall forfeit a sum of five pounds, and such neglect shall be *primâ facie* evidence that the person so neglecting had full knowledge that the trade mark was a forged trade mark, &c.

Sections 19 and 20 are also of much importance. They enact that the vendor of any article with a trade mark, or with a description of the number, quantity, measure, or weight of such article, or the place or country in which such article shall have been made, shall be deemed to contract that the trade mark was a true and genuine trade mark and not wrongfully used, and that no such description was in any material respect false or untrue, unless the contrary shall be expressed in some writing signed by or on behalf of the vendor and delivered to and accepted by the vendee.

This act applies to England, Ireland, and Scotland.

There is an excellent little treatise on "The Law of Trade Marks, with some account of its History and Development in the Decisions of the Courts of Law and Equity," by Edward Lloyd, Esq., Barrister-at-Law,^(a) which may be consulted with advantage.

HARRY BODKIN POLAND.

7, King's Bench Walk, Temple,
1862.

^(a) Published by W. Draper, 59, Carey-street, Lincoln's Inn.

THE
MERCHANDISE MARKS ACT,
1862.

25 & 26 VICT. CAP. 88.

An Act to amend the Law relating to the fraudulent marking of Merchandise.—[7th August 1862.]

WHEREAS it is expedient to amend the laws relating to the fraudulent marking of merchandise, and to the sale of merchandise falsely marked for the purpose of fraud: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Construction of Words.

1. In the construction of this act the word "person" (a) shall include any person, whether a subject of Her Majesty or not, and any body

corporate or body of the like nature, whether constituted according to the law of this country or of any of Her Majesty's colonies or dominions, or according to the law of any foreign country, and also any company, association, or society of persons, whether the members thereof be subjects of Her Majesty or not, or some of such persons subjects of Her Majesty and some of them not, and whether such body corporate, body of the like nature, company, association, or society be established or carry on business within Her Majesty's dominions or elsewhere, or partly within Her Majesty's dominions and partly elsewhere; the word "mark" shall include any name, signature, word, letter, device, emblem, figure, sign, seal, stamp, diagram, label, ticket, or other mark of any other description; and the expression "trade mark" (b) shall include any and every such name, signature, word, letter, device, emblem, figure, sign, seal, stamp, diagram, label, ticket, or other mark as aforesaid lawfully used (c) by any person to denote any chattel, or (in Scotland) any article of trade, manufacture, or merchandise, to be an article or thing of the manufacture, workmanship, production, or merchandise of such person, or to be an article or thing of any peculiar or particular description made or sold by such person, and shall also include any name, signature, word, letter, number, figure, mark, or sign which in pursuance of any statute or statutes for the time being in force relating to registered

designs(*d*) is to be put or placed upon or attached to any chattel or article during the existence or continuance of any copyright or other sole right acquired under the provisions of such statutes or any of them; the word "misdemeanor" shall include crime and offence in Scotland; and the word "court" shall include any sheriff or sheriff substitute in Scotland.

(*a*) "*Person*."—This definition is in accordance with the decisions of the courts. In *The Collins Company v. Brown*, 3 K. & J. 423, and *The Collins Company v. Cohen*, 3 K. & J. 428, it was decided that "a foreign manufacturer has a remedy by suit in this country for an injunction and account of profits, against a manufacturer here, who has committed a fraud upon him by using his trade mark, for the purpose of inducing the public to believe that the goods so marked were manufactured by the foreigner," and that "this relief is founded upon the personal injury caused to the plaintiff by the defendant's fraud, and exists, although the plaintiff resides and carries on his business in another country, and has no establishment here, and does not even sell his goods in this country. Vice-Chancellor Sir W. Page Wood in giving judgment in the former case said: "If a man has been in the habit of using a particular mark for his goods for a long time, during which no one else has used a similar mark, and then another person begins to use the same mark, that can only be with a fraudulent intent; and any fraud may be redressed in the country in which it is committed, whatever may be the country of the person who has been defrauded." In giving judgment in the latter case the same learned judge said, "I apprehend that every subject of every country not being an alien enemy—and even to an alien enemy the Court has extended relief in cases of fraud—has a right to apply to this court to have a fraudulent injury to his property arrested. And here the plaintiffs

have the right—a right recognised I imagine everywhere in the world, or at least in every civilised community—of saying, ‘We being the manufacturers of certain goods, claim that another man shall not manufacture goods and put upon them our trade mark, and then pass them off as manufactured by us:’” (See also *The Collins Company v. Reeves*, 6 W. R. 717; *The Collins Company v. Walker*, 7 W. R. 222.)

In *Pisani v. Lawson*, 6 Bing. N. C. 90, it was held that “an alien friend, although resident abroad, is entitled to sue in the courts at Westminster for a libel published concerning him in England.”

Notwithstanding the word “person” is to include *corporate* bodies, &c., the *criminal* proceedings mentioned in the act cannot be taken against such bodies, but the individuals actually committing the offences must be prosecuted. “A corporation aggregate may be indicted by their corporate name for breaches of duty, whether in the nature of a non-feasance, such as the non-repair of highways which it is their duty to repair, or of a misfeasance, such as the obstruction of a highway by a railway company in a manner not authorised by their Act of Parliament:” (*R. v. Birmingham and Gloucester Railway Company*, 2 Q. B. 47; *R. v. Great North of England Railway Company*, 9 Q. B. 315;) but such corporations cannot be so prosecuted for the offences created by this act which require “an act of understanding and an exercise of the will.”

(b) “*Trade mark*.”—It will be observed that the expression “trade mark” not only includes every mark lawfully used by a person to denote any chattel to be an article of the manufacture, workmanship, or production of such person, but also to be an article of the *merchandise* of such person, or to be an article of any peculiar or particular description made or sold by such person. This will include such cases as *Mottley v. Downman*, 3 M. & C. 1, where it was contended that the right to use the trade mark was attached to

a particular place and works, and to cases where the articles are distinguished by the name of a person who did not manufacture them, and to similar cases.

(c) "*Lawfully used.*"—To bring the "trade mark" within this act it must be "lawfully used," and a question may be raised whether trade marks which contain false statements of a gross character are "lawfully used." A court of equity will not protect persons who have been in the habit of using such trade marks by granting an injunction to restrain their piracy, on the ground that the plaintiff to entitle himself to claim the intervention of a court of equity must come into court with clean hands. In *Flavel v. Harrison*, 10 Hare, 467, the Court refused to protect the use of the name "Flavel's Patent Kitchener," because it was shown to the Court that no such article had ever been patented. So in *Pidding v. Howe*, 8 Sim. 477, the Court refused an injunction, because false statements were made as to the preparation of tea called "Howqua's Mixture." See, also, *Edelsten v. Vick*, 11 Hare, 78, and *Holloway v. Holloway*, 13 Beav. 209, where the statements, although not strictly true, were, under particular circumstances, held not to disentitle the plaintiffs to be protected by an injunction.

Although a court of equity will not interfere in certain cases, it does not therefore follow that the trade mark is *not lawfully used*, but only that the plaintiff, in consequence of misconduct, is not entitled to the protection of an injunction. Where goods have become known in the market by a particular mark, which contains such false statements that a court of equity will not protect its use, it could scarcely be successfully contended that it is not lawfully used within the meaning of this act, when proceedings are instituted by or on behalf of the Crown against a person who has forged such trade mark, or wrongfully applied it with intent to defraud. Even where an action is brought for injury done by the imitation of a trade mark, the plaintiff may, it would

seem, recover, notwithstanding his trade mark contains statements which are not quite accurate: (See *Sykes v. Sykes and another*, 3 B. & C. 541.) In this case certain goods manufactured by the plaintiff, were marked "Sykes Patent," in order to denote that they were manufactured by him. It was proved that some years since the plaintiff's father obtained a patent for the manufacture of the articles in question. In an action afterwards brought for infringing the patent. it was held to be invalid, on account of a defect in the specification; but the patentee, and afterwards the plaintiff, continued to mark their articles "Sykes Patent." It was contended, for the defendants, that the plaintiff could not maintain this action, for that one of the defendants being named *Sykes*, he had a right to mark his goods with that name; and had, also, as much right to add the word *patent* as the plaintiff—the patent granted to the latter having been declared invalid. It was, however, held, that an action on the case was maintainable against the defendants, as they had adopted the plaintiff's mark for the purpose of denoting that their goods were manufactured by the plaintiff, and had sold goods so marked *as and for* goods manufactured by the plaintiff.

(d) "*Statutes for the time being in force relating to registered designs.*"—These statutes are, 5 & 6 Vict. c. 100; 6 & 7 Vict. c. 65; 13 & 14 Vict. c. 104; 14 Vict. c. 8; 21 & 22 Vict. c. 70; and 25 Vict. c. 12.

Forging a Trade Mark or falsely applying any Trade Mark with intent to defraud, a Misdemeanor.

2. Every person who, with intent to defraud, or to enable another to defraud any person, shall forge or counterfeit (e), or cause or procure to be forged or counterfeited, any trade mark, or shall apply, or cause or procure to be applied, any trade mark or any forged or counterfeited trade mark to

any chattel or article not being the manufacture, workmanship, production, or merchandise of any person denoted or intended to be denoted by such trade mark, or denoted or intended to be denoted by such forged or counterfeited trade mark, or not being the manufacture, workmanship, production, or merchandise of any person whose trade mark shall be so forged or counterfeited, or shall apply, or cause or procure to be applied, any trade mark or any forged or counterfeited trade mark to any chattel or article, not being the particular or peculiar description of manufacture, workmanship, production, or merchandise denoted or intended to be denoted by such trade mark or by such forged or counterfeited trade mark, shall be guilty of a misdemeanor, and every person so committing a misdemeanor shall also forfeit to Her Majesty every chattel and article belonging to such person to which he shall have so unlawfully applied, or caused or procured to be applied, any such trade mark or forged or counterfeited trade mark as aforesaid, and every instrument in the possession or power of such person, and by means of which any such trade mark, or forged or counterfeited trade mark as aforesaid, shall have been so applied, and every instrument in the possession or power of such person for applying any such trade mark or forged or counterfeit trade mark as aforesaid, shall be forfeited to Her Majesty; and the court before which any such misdemeanor shall be tried may order such forfeited articles as

aforesaid to be destroyed or otherwise disposed of as such court shall think fit.

(e) "*Forge or counterfeit.*"—Forgery at common law is defined to be "the fraudulent making or alteration of a writing to the prejudice of another man's right," or as "a falsemaking, a making, *malo animo*, of any written instrument for the purpose of fraud and deceit," and in *R. v. John Smith*, 8 Cox Crim. Cas. 32; *S. C.*, D. & B. C. C. 566, it was held that the printing of certain labels without authority and with intent to defraud, in imitation of those used by the prosecutor for wrapping up for the purposes of sale certain powders manufactured by him, did not amount to the common law offence of forgery. Pollock, C.B., in giving judgment said, speaking of the labels, "They are merely wrappers, and in their present shape I doubt whether they are anything like a document or instrument which is the subject of forgery at common law. To say that they belong to that class of instruments seems to me to be confounding things together as alike which are essentially different. It might as well be said that if one tradesman used brown paper for his wrappers, and another tradesman had his brown paper wrappers made in the same way, he could be accused of forging the brown paper." Bramwell, B., said: "I think this is not a forgery. Forgery supposes the possibility of a genuine document, and that the false document is not so good as the genuine document, and that the one is not so efficacious for all purposes as the other. In the present case one of these documents is as good as the other; the one asserts what the other does; the one is as true as the other, but one gets improperly used." So in *R. v. Closs*, D. & B. C. C. 460; *S. C.*, 7 Cox Crim. Cas. 494, it was decided that the painting an artist's name in the corner of a picture in order to pass it off as an original picture by that artist is not a forgery. Cockburn, C.J., in giving judgment said: "We are all of opinion that that there was no forgery. A forgery must be of some document or writing; and this

was merely in the nature of a mark put upon the painting with a view of identifying it, and was no more than if the painter put any other arbitrary mark as a recognition of the picture being his." In the course of the argument of this case it was stated by the counsel that "no case had gone the length of holding that to stamp the name of *Manton* on a gun would be forgery;" upon which Crompton, J., said, "That would be forgery of a trade mark, and not of a name," and Cockburn, C.J., said, "Stamping a name on a gun would not be a writing; it would be the imitation of a mark, not of a signature:" (*Id.* 464.)

Happily the law upon this subject is now made clear, and the following offences are made misdemeanors by this section :

1. The forging or counterfeiting any trade mark with intent to defraud.
2. The applying a *genuine* or a forged trade mark, with intent to defraud, to anything not being the manufacture, &c., of any person denoted or intended to be denoted by such trade mark, or not being the manufacture, &c., of the person whose trade mark shall be forged.
3. The applying any *genuine* or forged trade mark with intent to defraud to anything not being the particular or peculiar description of manufacture, &c., denoted or intended to be denoted by such trade mark ; for instance, if a man has two trade marks, one for a particular description of goods of a superior quality, and another for a different description of goods of an inferior quality, the applying the trade mark for the goods of superior quality to the goods of inferior quality will be a misdemeanor under this section, if done "with intent to defraud," such intent being an essential ingredient in all the offences before mentioned.

As to adding to, altering and imitating trade marks, &c., see *post* sect. 5.

As to the form of the indictment, see *post* sect. 10, which enacts that no copy or facsimile of the trade mark

need be set out; and sect. 12, which enacts that the intent to defraud any particular person need not be alleged or proved.

As to the punishment in addition to the forfeiture of the chattels and instruments, see *post* sect. 14.

As to the time within which prosecution must be commenced, see *post* sect. 18.

The Courts of Quarter Sessions should not try any person charged with any of the misdemeanors created by this act. By 5 & 6 Vict. c. 38, they are expressly prohibited from trying persons charged with "Forgery;" but no mention is made in that statute as to whether they may try cases of an analogous character, such as those mentioned in sects. 2, 3, of the present act. In 4 Blackstone's Commentaries, 271, and in 4 Stephen's Commentaries, 383, it is laid down that "they cannot also try any newly-created offence without express power given them by the statute which creates it;" but it may be questionable whether they may not try new offences not included in 5 & 6 Vict. c. 38, where the statute creating the offence imposes no limit as to the court which is to try it. This matter is fully discussed in Dickinson's Quarter Sessions, 6th Edit., 156 to 160, and it appears to be the opinion of the learned editors of that work that the Courts of Quarter Sessions have jurisdiction over newly-created offences, with the exception of the cases included in 5 & 6 Vict. c. 38, and of those where the statute does not in any way limit their jurisdiction. The offence of forging a trade mark clearly cannot be tried at quarter sessions; and without giving any opinion as to whether the other offences created by the statute can be tried there, it will certainly be prudent, and more convenient in many cases, as, for instance, where the prosecutor desires, after committal of the person charged, to add a count for forging the trade mark, for the magistrates not to commit a person charged with any of those offences to be tried at the sessions.

It would have been better to have inserted a clause as was

done in 20 & 21 Vict. c. 54 (s. 16), and 24 & 25 Vict. c. 96 (s. 87), declaring that "no misdemeanor against this act shall be prosecuted or tried at any court of general or quarter sessions," and as was suggested to those who had charge of the bill during its progress through Parliament.

The clause referred to was unnecessary in the 20 & 21 Vict. c. 54, where new offences were created, unless the view now taken as to the jurisdiction of the courts of quarter sessions be correct.

Applying a forged Trade Mark to any Vessel, Case, Wrapper, &c., in or with which any Article is sold or intended to be sold, a Misdemeanor.

3. Every person who, with intent to defraud, or to enable another to defraud, any person, shall apply (*f*) or cause or procure to be applied any trade mark or any forged or counterfeited trade mark to any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing in, on, or with which any chattel or article shall be intended to be sold or shall be sold or uttered or exposed for sale, or intended for any purpose of trade or manufacture, or shall enclose or place any chattel or article, or cause or procure any chattel or article to be enclosed or placed, in, upon, under, or with any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing to which any trade mark shall have been falsely applied, or to which any forged or counterfeited trade mark shall have been applied, or shall apply or attach or cause or procure to be applied or attached to any chattel or article any case, cover, reel, ticket, label, or other thing to which any trade mark shall have been falsely

applied, or to which any forged or counterfeited trade mark shall have been applied, or shall enclose, place, or attach any chattel or article, or cause or procure any chattel or article to be enclosed, placed, or attached in, upon, under, with, or to any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing having thereon any trade mark of any other person, shall be guilty of a misdemeanor, and every person so committing a misdemeanor shall also forfeit to Her Majesty every such chattel and article, and also every such cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing as aforesaid in the possession or power of such person; and every other similar cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing made to be used in like manner as aforesaid, and every instrument in the possession or power of such person, and by means of which any such trade mark or forged or counterfeited trade mark as aforesaid shall have been applied, and also every instrument in the possession or power of such person for applying any such trade mark or forged or counterfeit trade mark as aforesaid, shall be forfeited to Her Majesty; and the court before which any such misdemeanor shall be tried may order such forfeited articles as aforesaid to be destroyed or otherwise disposed of as such court shall think fit.

(f) "*Apply*," &c.—The following offences are made misdemeanors by this section :

1. The applying, with intent to defraud, a genuine or forged trade mark to any cask or other thing in, on, or with which any chattel shall be intended to be sold, or shall be sold, uttered, or exposed for sale, or intended for any purpose of trade or manufacture.
2. The inclosing or placing with intent to defraud any chattel in, upon, under, or with any cask or other thing to which any genuine trade mark shall have been falsely applied, or to which any forged trade mark shall have been applied.
3. The applying or attaching to any chattel with intent to defraud any case or other thing to which any genuine trade mark shall have been falsely applied, or to which any forged trade mark shall have been applied.
4. The enclosing, placing, or attaching, with intent to defraud, any chattel in, upon, under, with, or to any cask or other thing having thereon any trade mark of any other person.

As to the form of the indictment, see *post* sect. 10, which enacts that no copy or *facsimile* of the trade mark need be set out, and sect. 12, which enacts that the intent to defraud any particular person need not be alleged or proved.

As to the punishment, in addition to the forfeiture of the chattels, casks, bottles, instruments, &c., see *post* sect. 14.

As to the time within which prosecution must be commenced, see *post*, sect. 18.

As to whether misdemeanors created by this act can be tried at courts of general or quarter sessions, see note to sect. 2, *ante*.

Selling Articles with forged or false Trade Marks after 31st December, 1863, Penalty equal to Value of Article sold, and a sum not exceeding 5l. nor less than 10s.

4. Every person who, after the thirty-first day of December one thousand eight hundred and sixty-three, shall sell, utter, or expose either for

sale or for any purpose of trade or manufacture, or cause or procure to be sold, uttered, or exposed for sale or other purpose as aforesaid, any chattel or article, together with any forged or counterfeited trade mark, which he shall know to be forged or counterfeited, (g) or together with the trade mark of any other person applied or used falsely or wrongfully or without lawful authority or excuse, knowing such trade mark of another person to have been so applied or used as aforesaid, and that whether any such trade mark or forged or counterfeited trade mark as aforesaid, together with which any such chattel or article shall be sold, uttered, or exposed for sale or other purpose as aforesaid, shall be in, upon, about, or with such chattel or article, or in, upon, about, or with any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing in, upon, about, or with which such chattel or article shall be so sold or uttered or exposed for sale or other purpose as aforesaid, shall for every such offence forfeit and pay to Her Majesty a sum of money equal to the value of the chattel or article so sold, uttered, offered, or exposed for sale or other purpose as aforesaid, and a further sum not exceeding five pounds and not less than ten shillings.

(g) "*Which he shall know to be forged,*" &c.—To commit an offence under this section it must be proved that the defendant *knew* that the trade mark was forged, or that it had been applied wrongfully, or without lawful authority or excuse. It is not necessary to prove by direct and positive

evidence that the defendant actually *knew* that the trade mark was forged, but such facts may be proved from which it may reasonably be presumed that the defendant had such guilty knowledge, as in the cases of uttering forged instruments and counterfeit coin. For the purpose of showing the guilty knowledge, resort may be had to the provisions contained in sect. 6 of this act (which see); but if upon a demand and order being made under that section, the person applied to gives the particulars required of him, he may nevertheless be convicted under sect. 4, provided it can be shown that he knew the trade mark was forged or had been wrongfully applied.

As to the proceedings to be taken for an offence under this section, see *post*, sects. 15, 16.

When the proceedings are taken under 11 & 12 Vict. c. 43, they need not, I think, be commenced within six calendar months from the time when the matter of the complaint or information respectively arose, as directed by sect. 11 of that act, as the time within which proceedings must be commenced is specially limited by sect. 18 of this act.

It must be borne in mind that any person who is dissatisfied with the determination of the justices as being erroneous *in point of law*, may have a case stated for the opinion of one of the superior courts under the 20 & 21 Vict. c. 43, and in every case of conviction before any of the magistrates of the police courts of the metropolis, in which the penalty adjudged to be paid is more than three pounds, or in which the penalty adjudged shall be imprisonment for more than one calendar month, an appeal is given to the general or Quarter sessions: (See 2 & 3 Vict. c. 71, s. 50.) On an appeal under this section the magistrates' decision can be reviewed upon questions, not only of law, but of fact as well.*

This section does not come into operation until after the 31st December, 1863, but when it does it will only give a summary remedy in respect to the offences there mentioned, and will not interfere with the law as it at present exists. It may, therefore, not be out of place here to mention that

if a person sells anything with a forged trade mark on it, and by means of such trade mark, or otherwise, falsely represents such thing to be manufactured by one man when he knew that it was not so manufactured, and by means of such false pretence obtains or *attempts* to obtain any money with intent to defraud, he may be indicted for a misdemeanor. In *R. v. Dundas*, 6 Cox Crim. Cas. 380, it was decided that an indictment for false pretences will be sustained by evidence that the prisoner had sold to the prosecutor blacking, which he represented to be "Everett's Premium," and which bore a label nearly, but not precisely, imitating Everett's labels, the said blacking not being "Everett's Premium" but a spurious manufacture. For the defence it was urged that as the labels were not similar, the prosecutor, by ordinary caution, might have protected himself. Mr. Justice Erle in summing up said: "With respect to the difference between the labels the jury would consider whether it was a small and colourable difference only and intended to deceive. It was of little consequence whether the man's name was Everett, as he had stated, or not, for even if it were and he went about the country and offered blacking for sale as "Everett's Premium," representing it to be the well known article of that name, knowing that it was not so, and intending to cheat the prosecutor by passing upon him a spurious article as the true one, his conduct was equally fraudulent."

This case was cited in the argument of *R. v. Bryan*, 7 Cox Crim. Cas. 312, D. & B. C. C. 265, and was commented upon and approved of in the judgment. The prisoner, in the case of *R. v. John Smith*, 8 Cox Crim. Cas. 32, D. & B. C. C. 566, after the indictment for forging the trade wrappers of George Borwick was quashed, pleaded guilty to an indictment for obtaining money by false pretences, which had been preferred at the same time as that for forgery: (See Central Criminal Court Sessions Papers, vol. xlviii. p. 8, and 8 Cox Crim. Cas. 37.) Mr. Justice Willes said, in giving judgment in *R. v. John Smith*, "In cases like the

present the remedy is well known : the prosecutor may, if he pleases, file a bill in equity to restrain the defendant from using the wrapper, or he may bring an action at law for damages, or *he may indict him for obtaining money under false pretences.*" Upon the authority of these cases a man named Jones was convicted of obtaining several sums of money, by means of some false wrappers made in imitation of those of Mr. Borwick, in March, 1860, before Sir Edward Creasy, the Deputy Assistant Judge of the Middlesex Sessions (now Chief Justice of Ceylon), and was sentenced to be kept in penal servitude for three years.

Additions to and Alterations of Trade Marks made with intent to defraud to be deemed Forgeries.

5. Every addition to and every alteration of, and also every imitation of any trade mark which shall be made, applied, or used with intent to defraud, or to enable any other person to defraud, or which shall cause a trade mark with such alteration or addition, or shall cause such imitation of a trade mark to resemble any genuine trade mark so or in such manner as to be calculated or likely to deceive, shall be and be deemed to be a false, forged, and counterfeited trade mark within the meaning of this act ; and every act of making, applying, or otherwise using any such addition to or alteration of a trade mark or any such imitation of a trade mark as aforesaid done by any person with intent to defraud, or to enable any other person to defraud, shall be and be deemed to be forging and counterfeiting a trade mark within the meaning of this act.

This section is very obscurely worded. It says that every addition to, and every alteration of a trade mark which shall

be made, applied or used with intent to defraud, shall be, and be deemed to be a forged trade mark—it means that a *trade mark*, which is altered, or to which any addition is made with intent to defraud, shall be, and be deemed to be a forged trade mark. It also says that every addition to, and every alteration of any trade mark which shall cause a trade mark with such alteration or addition to resemble any genuine trade mark, so as to be likely to deceive, shall be, and be deemed to be a forged trade mark—it means that a trade mark which shall be altered, or to which any addition is made, so as to cause it to resemble any genuine trade mark, in such manner as to be likely to deceive, shall be, and be deemed to be a forged trade mark.

It has long since been decided that “proof of the altering of a part of a genuine instrument will support an indictment, charging the defendant with having forged the instrument itself. As, for instance, where the indictment charged the defendant with having made, forged, and counterfeited a bill of exchange, the judges held that evidence of his having altered the bill, which was originally for ten pounds, so as to make it appear to be a bill for fifty pounds, supported the indictment; even although the statute, on which the indictment was framed, contained the word “alter,” as well as the word “forge:” (*R. v. Teagus*, 2 East. P. C. 979; *R. & R.* 33: See *R. v. Atkinson*, 7 C. & P. 669.) It is more usual, however, and perhaps more prudent, at least in one set of counts, to charge it as an alteration merely, and to allege the alteration specially. But there is no doubt that any the slightest alteration of a genuine instrument in a material part, whereby a new operation is given to it, is a forgery; as, for instance, making a lease of the manor of Dale appear to be a lease of the manor of Sale by changing the D. to S: (1 Hawk, c. 70, s. 2;) making a bill of exchange for eight pounds appear to be for eighty pounds, by adding a cipher to the eight: (*R. v. Elsworth*, 2 East. P. C. 986-988;) altering a banker’s one pound note, by substituting the word ten for the word one: (*R. v. Post*, *R. & R.* 101;) even altering the

notes of a country banker, as to the place in which they were made payable in London, has been holden to be a forgery: (*R. v. Treble*, 2 Taunt, 328; *R. & R.* 164; Archbeld's Criminal Pleading and Evidence by Welsby, 15th edit. 485.)

According to Russell (2 *R. C. & M.* 319), "Not only the fabrication and false making of the whole of a written instrument, but a fraudulent insertion, alteration, or erasure even of a letter in any material part of a true instrument, whereby a new operation is given to it, will amount to forgery."

See also *R. v. Collicott* (*R. & R.* 212-229), where it was held that the offence of uttering a forged stamp will be complete, though at the time of uttering, that part, which in a genuine stamp would in terms specify the amount of duty, is concealed or cut out, and though that part where the paper was entire and unconcealed did not contain anything specifying the amount of duty, provided the *parts left visible are like a genuine stamp*. The stamps used by the prisoner in this case differed much from the stamps provided by the Commissioners of Stamps before they were affixed to the bottles and boxes; but in affixing them to the bottles and boxes care was taken, by the prisoner's express orders, to cover or conceal the stamped label, wherein it materially differed from the true and genuine stamp, by sealing-wax, so that when the stamped label was seen on the bottle or box, the material difference between the true and the counterfeit stamp was not perceptible. When the label was fixed on some of the bottles the centre piece was cut out, so as to admit the neck of the bottle to come through. Mr. Justice Le Blanc left the question for the jury on the evidence, and on an inspection of the stamps as they appeared on the bottles and boxes and before they were so used, whether the paper so uttered by the prisoner did resemble the mark or stamp provided by the Commissioners of Stamps. The jury found the prisoner guilty, and all the judges were of opinion that the conviction was right.

Any Person who, after 31st December 1863, shall have sold an Article having a false Trade Mark to be bound to give Information where he procured it—Power to Justices to summon Parties refusing to give Information—Penalty for Refusal 5l.

6. Where any person who, at any time after the thirty-first day of December one thousand eight hundred and sixty-three, shall have sold, uttered, or exposed for sale or other purpose as aforesaid, or shall have caused or procured to be sold, uttered, or exposed for sale or other purpose as aforesaid, any chattel or article, together with any forged or counterfeited trade mark, or together with the trade mark of any other person used without lawful authority or excuse as aforesaid, and that whether any such trade mark, or such forged or counterfeited trade mark as aforesaid, be in, upon, about, or with such chattel or article, or in, upon, about, or with any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing in, upon, about, or with which such chattel or article shall have been sold or exposed for sale, such person shall be bound upon demand in writing delivered to him or left for him at his last known dwelling-house or at the place of sale or exposure for sale by or on the behalf of any person whose trade mark shall have been so forged or counterfeited, or used without lawful authority or excuse as aforesaid, to give to the person requiring the same, or his attorney or agent, within forty-eight hours after such demand,

full information in writing of the name and address of the person from whom he shall have purchased or obtained such chattel or article, and of the time when he obtained the same; and it shall be lawful for any justice of the peace, on information on oath of such demand and refusal, to summon before him the party refusing, and on being satisfied that such demand ought to be complied with to order such information to be given within a certain time to be appointed by him; and any such party who shall refuse or neglect to comply with such order shall for every such offence forfeit and pay to Her Majesty the sum of five pounds, and such refusal or neglect shall be *primâ facie* evidence that the person so refusing or neglecting had full knowledge that the trade mark, together with which such chattel or article was sold, uttered, or exposed for sale, or other purpose as aforesaid, at the time of such selling, uttering, or exposing was a forged, counterfeited, and false trade mark, or was the trade mark of a person which had been used without lawful authority or excuse, as the case may be.

As to the proceedings to be taken for an offence under this section, see *post*, sects. 15 and 16, and observations on sect. 4, *ante*.

Marking any false Indication of quantity, &c., upon an Article with Intent to defraud, Penalty a Sum equal to the value of the Article and the further Sum not exceeding 5l. and not less than 10s.

7. Every person who, with intent to defraud(h)

or to enable another to defraud, shall put or cause or procure to be put upon any chattel or article, or upon any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing, together with which any chattel or article shall be intended to be or shall be sold or uttered or exposed for sale, or for any purpose of trade or manufacture, or upon any case, frame, or other thing in or by means of which any chattel or article shall be intended to be or shall be exposed for sale, any false description, statement, or other indication of or respecting the number, quantity, measure, or weight of such chattel or article, or any part thereof, or of the place or country in which such chattel or article shall have been made, manufactured, or produced, or shall put or cause or procure to be put upon any such chattel or article, cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or thing as aforesaid, any word, letter, figure, signature, or mark for the purpose of falsely indicating such chattel or article, or the mode of manufacturing or producing the same, or the ornamentation, shape, or configuration thereof, to be the subject of any existing patent, (i) privilege, or copyright, shall for every such offence forfeit and pay to Her Majesty a sum of money equal to the value of the chattel or article so sold or uttered or exposed for sale, and a further sum not exceeding five pounds and not less than ten shillings.

It must not be forgotten, that this section does not prevent a person from being indicted, provided he has committed an indictable offence punishable by the law as it now exists. For instance, if a person fraudulently and knowingly make a false statement as to the weight, &c., of an article, and by means thereof obtain any money, he may be convicted of obtaining money by false pretences under 24 & 25 Vict. c. 96, s. 88: (See *R. v. Sherwood*, 7 Cox Crim. Cas. 270; D. & B. C. C. 251.) The case of *R. v. Reed*, (7 C. & P. 848), is not law now. If the fraud be not successful he may be indicted for the attempt; or where no direct attempt is made to obtain money, if the person put a false description of the weight, &c., on any article with the intent to obtain money by means of such false description, he may be indicted for a misdemeanor at common law. The rule upon this subject is stated in Dickinson's Quarter Sessions, 6th edit. 309, as follows: "It may be observed that although a bare criminal intent is not in itself indictable, if merely expressed in words or gestures, or otherwise without further proceeding to the crime to which it points, yet if it is accompanied by any act being a proximate step and attempt towards the accomplishment of the crime, that act, though in itself out of the reach of indictment, will not be judged alone, but as coupled with the criminal intent which prompted it, and is, therefore, punishable on indictment." Thus, the possession of counterfeit coin or obscene prints, with intent to utter them, is no offence at common law; but *procuring* them with a like intent clearly is: (*R. v. Fuller*, R. & R. 308; *Dugdale v. The Queen*, Dear C. C. 64; S. C., 1 E. & B. 435. See also *R. v. Roberts*, Dear C. C. 539; 7 Cox Crim. Cas. 39.) In the last-mentioned case the prisoner *procured dies* for the purpose of making counterfeit coin, and intended to get the rest of the apparatus necessary for coining and to make counterfeit coin. It was held, that *procuring the dies* alone was an act in furtherance of the criminal purpose sufficiently proximate to the offence, and sufficiently showing the criminal intent, to support an indict-

ment. Jervis, C.J. said: "Here there is no direct attempt to coin; but the indictment is founded on a criminal intent coupled with an act immediately connected with the offence. It is difficult, and perhaps impossible, to lay down a clear and definite rule to define what is and what is not such an act done in furtherance of a criminal intent as will constitute an offence; at all events I shall not attempt to do so."

(h) "*With intent to defraud.*"—The words, with intent to defraud, override the whole section.

(i) "*To be the subject of any existing patent.*"—Where a patentee has been in the habit of marking his goods in a particular way to denote that they were made by him according to his patent—where, for instance, he has been accustomed to mark them with the words "Jones's Patent," will it be an offence if he continue so to mark them *after* the patent has expired? After using a particular mark, and after goods for many years have become known in the market by such mark, and have acquired a good reputation, it would be very injurious to the manufacturer if he had to change the mode of marking his goods. The offence created by this section is to put on any chattel any "mark," &c., "for the purpose of *falsely* indicating such chattel to be the subject of any existing patent." Continuing to put the words "Jones's Patent" on the goods after the patent has expired would not, therefore, be for the purpose mentioned; but in order to denote that they were manufactured by him according to the mode which he had formerly patented, and to distinguish them from goods of the same description manufactured by other persons: (See *Sykes v. Sykes and another*, 3 B. & C, 541, and *Edelsten v. Vick*, 11 Hare, 78). No words may be used after the expiration of the patent which indicate that the patent right still exists. • See sect. 9, *post*, and observations thereon.

As to the proceedings to be taken for an offence under this section, see, *post*, sects. 15, 16.

As to within what time proceedings must be commenced, see, *post*, sect. 18 of this act; and observations upon sect. 4 of this act, *ante*.

As to special case and appeal, where persons are dissatisfied with the determination of the justices, see observations to sect. 4, *ante*.

It is to be regretted that the false description of the "quality" of goods is not made an offence (See *R. v. Bryan*, 7 Cox Crim. Cas. 312; D. & B. C. C. 265; and specially the judgments of Mr. Justice Willes and Mr. Baron Bramwell.)

*Selling or exposing for Sale after the 31st December 1863
Articles with false Statement of Quantities, &c., Penalty not
more than 5l. or less than 5s.*

8. Every person who, after the thirty-first day of December one thousand eight hundred and sixty-three, shall sell, utter, or expose for sale or for any purpose of trade or manufacture, or shall cause or procure to be sold, uttered, or exposed for sale or other purpose as aforesaid, any chattel or article upon which shall have been, to his knowledge (j), put, or upon any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing together with which such chattel or article shall be sold or uttered or exposed for sale or other purpose as aforesaid, shall have been so put, or upon any case, frame, or other thing used or employed to expose or exhibit such chattel or article for sale shall have been so put, any false description, statement, or other indication of or respecting the number, quantity, measure, or weight of such chattel or

article or any part thereof, or the place or country in which such chattel or article shall have been made, manufactured, or produced, shall for every such offence forfeit and pay to Her Majesty a sum not exceeding five pounds and not less than five shillings.

(j) "*To his knowledge.*"— In order to convict for an offence under this section, it must be shown that the defendant *knew* that the "*description,*" &c., of the "*number, quantity, measure, or weight,*" &c., was false. See observations on sect. 4, *ante*.

As to the proceedings to be taken for an offence under this section, see *post*, sects. 15, 16.

As to the time within which proceedings must be commenced, see *post*, sect. 18 ; and observations upon sect. 4 of this act, *ante*.

As to the special case and appeal where persons are dissatisfied with the determination of the justices, see observations to sect. 4, *ante*.

Proviso that it shall not be an Offence to apply Names or Words known to be used for indicating particular Classes of Manufactures.

9. Provided always, that the provisions of this act shall not be construed so as to make it any offence for any person to apply to any chattel or article, or to any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing with which such chattel or article shall be sold or intended to be sold, any name, word, or expression generally used for indicating such chattel or article to be of some particular class or description of manufacture only, or so as to make

it any offence for any person to sell, utter, or offer or expose for sale any chattel or article to which, or to any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing sold therewith, any such generally used name, word, or expression as aforesaid shall have been applied.

The object of this section is clear. It is intended to protect persons who deal in *Patent Leather*, *Patent Fuel*, *Brussels Carpets*, *Mechlin Lace*, *Croydon Bleach*, and similar goods, where the name, though not in fact accurate, from general use distinctly indicates such goods to be of some particular class or description of manufacture. In such cases the goods have acquired a certain name by reputation, the use of which name can in no way injure or deceive any one.

Description of Trade Marks and forged Trade Marks in Indictments, &c.

10. In every indictment, pleading, proceeding, and document whatsoever in which any trade mark shall be intended to be mentioned it shall be sufficient to mention or state the same to be a trade mark without further or otherwise describing such trade mark, or setting forth any copy or fac-simile thereof; and in every indictment, pleading, proceeding, and document whatsoever in which it shall be intended to mention any forged or counterfeit trade mark it shall be sufficient to mention or state the same to be a forged or counterfeit trade mark without further or otherwise describing such forged or counterfeit

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10 trade mark, or setting forth any copy or fac-simile
10 thereof.

5 This clause is similar in principle to 2 & 3 Will. 4, c. 123,
s. 3; 14 & 15 Vict. c. 100, ss. 5, 6, 7; and 24 & 25 Vict.
c. 98, s. 43.

Conviction not to affect any Right or Civil Remedy.

11. The provisions in this act contained of
or concerning any act, or any proceeding, judg-
ment, or conviction for any act hereby declared
to be a misdemeanor or offence, shall not nor shall
any of them take away, diminish, or prejudicially
affect any suit, process, proceeding, right, or
remedy which any person aggrieved by such act
may be entitled to at law, in equity, or otherwise,
and shall not nor shall any of them exempt or
excuse any person from answering or making
discovery upon examination as a witness or upon
interrogatories, or otherwise, in any suit or other
civil proceeding: Provided always, that no
evidence, statement, or discovery which any per-
son shall be compelled to give or make shall be
admissible in evidence against such person in
support of any indictment for a misdemeanor at
common law or otherwise, or of any proceeding
under the provisions of this Act.

This clause is similar to 20 & 21 Vict. c. 54, s. 11, which
is now repealed. It will be observed that the defendant
may be convicted by *other evidence*, this clause in this
respect being different from 24 & 25 Vict. c. 96, ss. 29 and 85,
and of course *R. v. Skeen and Freeman* (8 Cox Crim. Cas.
143; 28 L. J. M. C. 91), is not applicable.

Intent to defraud, &c., any particular Person need not be alleged in an Indictment, &c., or proved.

12. In every indictment, information, conviction, pleading, and proceeding against any person for any misdemeanor or other offence against the provisions of this act in which it shall be necessary to allege or mention an intent to defraud, or to enable another to defraud, it shall be sufficient to allege or mention that the person accused of having done any act which is hereby made a misdemeanor or other offence did such act with intent to defraud, or with intent to enable some other person to defraud, without alleging or mentioning an intent to defraud any particular person; and on the trial of any such indictment or information for any such misdemeanor, and on the hearing of any information or charge of or for any such other offence as aforesaid, and on the trial of any action against any person to recover a penalty for any such other offence as aforesaid, it shall not be necessary to prove an intent to defraud any particular person, or an intent to enable any particular person to defraud any particular person, but it shall be sufficient to prove with respect to every such misdemeanor and offence that the person accused did the act charged with intent to defraud, or with intent to enable some other person to defraud, or with the intent that any other person might be enabled to defraud.

This clause is similar to 14 & 15 Vict. c. 100, s. 8; 24 &

25 Vict. c. 98, s. 44; 24 & 25 Vict. c. 97, s. 60; and 24 & 25 Vict. c. 96, s. 88.

In *R. v. Nash*, 2 Den. C. C. 493, Mr. Justice Maule said that a man might be convicted of forging and uttering an instrument *with intent to defraud*, though there is no person in a situation to be defrauded by his act.

Persons who aid in the Commission of a Misdemeanor to be also guilty.

13. Every person who shall aid, abet, counsel, or procure the commission of any offence which is by this act made a misdemeanor shall also be guilty of a misdemeanor.

This is so at common law. "In crimes under the degree of felony there can be no accessories; but all persons concerned therein if guilty at all are principals" (4 Black. Com. 36; 1 Hale P. C. 613).

The 11 & 12 Vict. c. 43, s. 5, makes provision for the punishment and prosecution of aiders, abettors, &c., of an offence punishable on summary conviction.

Punishment for Misdemeanor under this Act.

14. Every person who shall be convicted or found guilty of any offence which is by this act made a misdemeanor shall be liable, at the discretion of the court and as the court shall award, to suffer such punishment by imprisonment for not more than two years, with or without hard labour, or by fine, or both by imprisonment with or without hard labour and fine, and also by imprisonment until the fine (if any) shall have been paid and satisfied.

In addition to the punishment by fine and imprisonment certain things are forfeited to Her Majesty upon conviction of the offender under sects. 2 and 3 of this act, and the court has power to order the forfeited articles to be destroyed or otherwise disposed of.

Recovery of Penalties.

15. In every case in which any person shall have committed or done any offence or act whereby he shall have forfeited or become liable to pay to Her Majesty any of the penalties or sums of money(*k*) mentioned in the provisions of this act, every such penalty or sum of money shall or may be recovered(*l*) in England, Wales, or Ireland in an action of debt, which any person may as plaintiff(*m*) for and on behalf of Her Majesty commence and prosecute to judgment in any court of record, and the amount of every such penalty or sum of money to be recovered in any such action shall or may be determined by the jury (if any) sworn to try any issue in such action, and if there shall be no such jury then by the court or some other jury, as the court shall think fit, or instead of any such action being commenced such penalty or sum of money shall or may in England or Wales be recovered by a summary proceeding before two justices of the peace having jurisdiction in the county or place where the party offending shall reside or have any place of business, or in the county or place in which the offence shall have been committed; and shall or may in Ireland be recovered in like manner by civil bill in the

civil bill court of the county or place in which the offence was committed, or in which the offender shall reside or have any place of business; and shall or may in Scotland be recovered by action before the Court of Session in ordinary form or by summary action before the sheriff of the county where the offence shall have been committed or the offender may reside or have any place of business, which sheriff, upon proof of the offence, either by the confession of the person offending or by the oath or affirmation of one or more credible witnesses, shall convict the offender, and find him liable in the penalty or penalties aforesaid as also in expenses; and it shall be lawful for the sheriff in pronouncing such judgment for the penalty or penalties and costs to insert in such judgment a warrant in the event of such penalty or penalties and costs not being paid to levy and recover the amount of the same by poinding: provided always, that it shall be lawful to the sheriff, in the event of his dismissing the action and assailing the defender, to find the complainer liable in expenses, and any judgment so to be pronounced by the sheriff in such summary action shall be final and conclusive, and not subject to review by advocacy, suspension, reduction, or otherwise.

(k) "*Penalties or sums of money.*"—In addition to the "Penalties" the "sums of money mentioned in the provisions of this act," which a person may become liable to pay to Her Majesty, are the sums equal to the value of the

chattels, &c., sold, uttered, offered, or exposed for sale or other purpose of trade or manufacture, under sect. 4, and the sums equal to the value of the chattels, &c., sold, uttered, or exposed for sale under sect. 7.

(d) "*May be recovered.*"—There are several modes of recovering the penalties, &c., given by this section, and the prosecutor can adopt any one of them :

1. In England, Wales, or Ireland, by action of debt, in which any person may sue for Her Majesty, and the jury are to determine the amount of the penalty within the limits fixed by the act, and the value of the chattels, &c.
2. In England or Wales, by a summary proceeding before justices, as to which see sect. 16.
3. In Ireland, by civil bill in the Civil Bill Court.
4. In Scotland, by action before the Court of Session in the usual way.
5. In Scotland, by summary action before the sheriff.

As to the time within which proceedings must be commenced, see sect. 18.

The person suing is to have no part of the penalty or sum recovered, but he will be entitled to full costs, under sect. 17.

The defendant, if he succeed in obtaining a verdict, will be entitled to costs, see sect. 23.

(m) "*Which any person may as plaintiff.*"—"A corporation aggregate cannot in general sue as a common informer" (Grant on Corporations, 198, and see the note to *The Weavers' Company, quâ tam, v. Forrest*, Strange 1241), but under this act a corporation, &c., may sue on behalf of Her Majesty, because "person," by clause 1, is expressly made to include bodies corporate, bodies of the like nature, &c.

*Summary Proceedings before Justices to be within
11 & 12 Vict. c. 43.*

16. In every case in which any such penalty or sum of money forfeited to Her Majesty as herein-before mentioned shall be sought to be recovered by a summary proceeding before two justices of the peace, the offence or act by the committing or doing of which such penalty or sum of money shall have been so forfeited shall be and be deemed to be an offence and act within the meaning of a statute passed in the twelfth year of the reign of Her present Majesty, intituled *An Act to facilitate the Performance of the Duties of Justices of the Peace out of Sessions within England and Wales with respect to summary Convictions and Orders*; and the information, conviction of the offender, and other proceedings for the recovery of the penalty or sum so forfeited shall be had according to the provisions of the said act.

The 11 & 12 Vict. c. 43, is known as one of Jervis' Acts. By sect. 11 of that act the time for making the complaint or laying the information is limited to "six months from the time when the matter of such complaint or information respectively arose," but that provision is not applicable to proceedings under this act, because such time is "specially limited" by sect. 18 of this act, which see.

In Actions Penalties to be accounted for in like Manner as other Moneys payable to the Crown, and Plaintiffs to recover full Costs of Suit.

17. In every case in which judgment shall be obtained in any such action as aforesaid (n) for the

amount of any such penalty or sum of money forfeited to Her Majesty, the amount thereof shall be paid by the defendant to the sheriff or the officer of the court, who shall account for the same in like manner as other moneys payable to Her Majesty, and, if it be not paid, may be recovered, or the amount thereof levied, or the payment thereof enforced, by execution or other proper proceeding, as money due to Her Majesty; and the plaintiff suing on behalf of Her Majesty, upon obtaining judgment, shall be entitled to recover and have execution for all his costs of suit,^(x) which shall include a full indemnity for all costs and charges which he shall or may have expended or incurred in, about, or for the purposes of the action, unless the court, or a judge thereof, shall direct that costs of the ordinary amount only shall be allowed.

(n) "*Such action as aforesaid.*"—"Such action" refers to the action to be brought under sect. 15.

(x) "*Costs of suit.*"—All the costs incurred by the plaintiff in, about, or for the purposes of the action are to be paid to the plaintiff by the defendant, unless the court shall direct that the costs of the ordinary amount only shall be allowed. The former will be costs and charges as between attorney and client, the latter as between party and party. The provisions of this act have been evidently carefully framed to prevent persons not really interested in the matter bringing actions. No part of the penalty or sum recovered is to go to the persons suing, and even full costs and charges which would only in practice be given to a person having an interest in the proceedings could never be more than a bare indemnity for the expenses actually incurred.

The defendant, if he succeed in obtaining a verdict, will be entitled to costs and charges in the same way. See sect. 23.

It was necessary to insert clauses with reference to costs, because the plaintiff can only sue on behalf of Her Majesty for penalties, &c., all of which go to Her Majesty, and cannot recover damages so as to entitle him to costs under the Statute of Gloucester.

Limitations of Actions, &c.

18. No person shall commence any action or proceeding for the recovery of any penalty, or procuring the conviction of any offender in manner herein-before provided, after the expiration of three years next after the committing of the offence, or one year next after the first discovery thereof by the person proceeding.

This special limitation as to commencing proceedings under this act overrides the 11 & 12 Vict. c. 43, s. 11, which limits the time for proceeding summarily to six calendar months.

After 31st December 1863 Vendor of an Article with a Trade Mark to be deemed to contract that the Mark is genuine.

19. In every case in which at any time after the thirty-first day of December one thousand eight hundred and sixty-three any person shall sell or contract to sell (whether by writing or not) to any other person any chattel or article with any trade mark thereon, or upon any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing together with which

such chattel or article shall be sold or contracted to be sold, the sale or contract to sell shall in every such case be deemed to have been made with a warranty or contract by the vendor to or with the vendee that every trade mark upon such chattel or article, or upon any such cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing as aforesaid, was genuine and true,^(o) and not forged or counterfeit, and not wrongfully used,^(p) unless the contrary shall be expressed in some writing signed by or on behalf of the vendor, and delivered to and accepted by the vendee.

(o) "*Genuine and true.*"—The expression "genuine and true," used in opposition to "forged or counterfeit," means only that the trade mark is a genuine trade mark, and not that the particulars stated on the face of it and forming part of it are true.

(p) "*Not wrongfully used.*"—These words are most important. Whenever anything is sold with a trade mark thereon, &c., the vendor shall be deemed not only to contract that the trade mark is genuine, but that the thing itself is the thing which the trade mark is ordinarily used to denote. In many cases labels with a trade mark on them are issued by a person to his customers in order that such labels may be attached by them to articles of his manufacture, and therefore when anything is sold with one of these labels attached thereto, the vendor shall, under this section, be deemed to contract not only that the label is the genuine label of the person who issued it, but also that the thing itself is that which the trade mark is intended to denote when lawfully used by the person whose trade mark it is.

After 31st December 1863 Vendor of an Article with Description upon it of its Quantity to be deemed to contract that the Description was true.

20. In every case in which at any time after the thirty-first day of December one thousand eight hundred and sixty-three any person shall sell or contract to sell (whether by writing or not) to any other person any chattel or article upon which, or upon any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing together with which such chattel or article shall be sold or contracted to be sold, any description, (q) statement, or other indication of or respecting the number, quantity, measure, or weight of such chattel or article, or the place or country in which such chattel or article shall have been made, manufactured, or produced, the sale or contract to sell shall in every such case be deemed to have been made with a warranty or contract by the vendor to or with the vendee that no such description, statement, or other indication was in any material respect false or untrue, unless the contrary shall be expressed in some writing signed by or on behalf of the vendor, and delivered to and accepted by the vendee.

(q) "*Any description,*" &c.—This enactment is like the last, only it applies to "any description, statement, or other indication of or respecting the number, quantity, measure, or weight of such chattel, or the place or country in which such chattel shall have been made," &c.

The vendor shall be deemed to contract that no such description, &c., was in *any material respect false or untrue*.

Some words appear to have been accidentally omitted. The section must be read as if the words "there shall be" were inserted after "upon which," line 6.

In Suits at Law or in Equity against Persons for using forged Trade Marks, Court may order Article to be destroyed, and may award Injunction, &c.

21. In every case in any suit at law or in equity against any person for forging or counterfeiting any trade mark, or for fraudulently applying any trade mark, to any chattel or article, or for selling, exposing for sale, or uttering any chattel or article with any trade mark falsely or wrongfully applied thereto, or with any forged or counterfeit trade mark applied thereto, or for preventing the repetition or continuance of any such wrongful act, or the committal of any similar act, in which the plaintiff shall obtain a judgment or decree against the defendant, the court shall have power to direct every such chattel and article to be destroyed or otherwise disposed of; and in every such suit in a court of law the court shall or may upon giving judgment for the plaintiff award a writ of injunction (*r*) or injunctions to the defendant commanding him to forbear from committing and not by himself or otherwise to repeat or commit any offence or wrongful act of the like nature as that of which he shall or may have been convicted by such judgment, and any disobedience of any such writ of injunction or injunctions shall be punished

as a contempt of court; and in every such suit at law or in equity it shall be lawful for the court or a judge thereof to make such order as such court or judge shall think fit for the inspection (y) of every or any manufacture or process carried on by the defendant in which any such forged or counterfeit trade mark, or any such trade mark as aforesaid, shall be alleged to be used or applied as aforesaid, and of every or any chattel, article, and thing in the possession or power of the defendant alleged to have thereon or in any way attached thereto any forged or counterfeit trade mark, or any trade mark falsely or wrongfully applied, and every or any instrument in the possession or power of the defendant used or intended to be or capable of being used for producing or making any forged or counterfeit trade mark, or trade mark alleged to be forged or counterfeit, or for falsely or wrongfully applying any trade mark; and any person who shall refuse or neglect to obey any such order shall be guilty of a contempt of court.

(r) "*Upon giving judgment for the plaintiff award a writ of injunction.*"—The power given to courts of law to grant injunctions will save much trouble and expense. The course which formerly had to be adopted to restrain a person from fraudulently using a trade mark was to apply to a court of equity for an injunction; and in many cases where, for instance, the plaintiff's right to use the trade mark was not clear, such court would refuse to interfere on his behalf until he had first established his title at law. An action then became necessary, and if the plaintiff succeeded a sub-

sequent application had to be made to the court of equity for an injunction.

The plaintiff should endorse on the writ of summons and on the copy that he intends to claim a writ of injunction (See the Common Law Procedure Act 1854, sects. 79, 80, 81, 82, and C.L.P.A. 1860, sect. 32.)

It may be that under the section now under consideration the court may, *upon giving judgment* for the plaintiff, award a writ of injunction, although no notice has been given by the plaintiff of his intention to claim it.

When is the writ to be awarded under this section? "Upon giving judgment for the plaintiff," it says; but when is judgment *given* by a court of law? Can the judge who tries the case order the writ to be awarded when judgment is signed, or after verdict and before signing judgment must an application be made to the court for an injunction? It will be noticed that in one part of the section the expression, "*court or judge*," is mentioned.

Before the Common Law Procedure Act, a court of common law had power to grant injunctions in actions for the infringement of letters patent (See 15 & 16 Vict. c. 83, s. 42).

(g) "*Inspection*."—During the progress of the suit at law or in equity it will be seen that the court or a judge thereof may make an order for inspection in three classes of cases:

1. For the inspection of every manufacture or process carried on by the defendant in which any forged or counterfeit trade mark shall be alleged to be used, or in which any trade mark shall be fraudulently, falsely, or wrongfully applied.
2. For the inspection of everything in the possession or power of the defendant alleged to have thereon or attached thereto any forged or counterfeit trade mark, or any trade mark falsely or wrongfully applied.

3. For the inspection of every *instrument* in the possession or *power* of the defendant used, intended to be, or capable of being used for *making* a forged or counterfeit trade mark, or a trade mark *alleged* to be forged or counterfeit, or for falsely or wrongfully applying any trade mark.

In actions for the infringement of letters patent the court can order an inspection (See 15 & 16 Vict., c. 83, s. 42, and Day's Common Law Procedure Acts, 231, where the cases upon this subject are collected.)

Persons aggrieved by Forgeries may recover Damages against the guilty Parties.

22. In every case in which any person shall do or cause to be done any of the wrongful acts following; (that is to say), shall forge or counterfeit any trade mark; or for the purpose of sale, or for the purpose of any manufacture or trade, shall apply any forged or counterfeit trade mark to any chattel or article, or to any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or thing in or with which any chattel or article shall be intended to be sold or shall be sold or uttered or exposed for sale, or for any purpose of trade or manufacture; or shall inclose or place any chattel or article in, upon, under, or with any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing to which any trade mark shall have been falsely applied, or to which any forged or counterfeit trade mark shall have been applied; or shall apply or attach to any chattel or article any case, cover, reel,

wrapper, band, ticket, label, or other thing to which any trade mark shall have been falsely applied, or to which any forged or counterfeit trade mark shall have been applied; or shall inclose, place, or attach any chattel or article in, upon, under, with, or to any cask, bottle, stopper, vessel, case, cover, reel, wrapper, band, ticket, label, or other thing having thereon any trade mark of any other person; every person aggrieved(*s*) by any such wrongful act shall be entitled to maintain an action or suit for damages(*t*) in respect thereof against the person who shall be guilty of having done such act or causing or procuring the same to be done, and for preventing the repetition or continuance of the wrongful act(*u*), and the commitment of any similar act.

(*s*) "*Every person aggrieved.*"—This includes bodies corporate, bodies of the like nature, companies, &c.

(*t*) "*Action or suit for damages.*"—Any person may take proceedings to recover *penalties*, &c., on behalf of Her Majesty, and the person *aggrieved* may also recover *damages* for the injury done to him by the defendant.

(*u*) "*And for preventing the repetition or continuance of the wrongful act.*"—These words refer to the granting of an injunction by the courts of common law upon judgment being obtained by the plaintiff in an action.

In actions brought under this section the *ordinary* costs only will be recoverable by either plaintiff or defendant in the usual way, as the special provisions in this act as to costs apply only to actions brought on behalf of Her Majesty.

Defendant obtaining a Verdict to have full Indemnity for Costs.

23. In every action which any person shall under the provisions of this act commence as plaintiff for or on behalf of Her Majesty for recovering any penalty or sum of money, if the defendant shall obtain judgment, he shall be entitled to recover his costs of suit, which shall include a full indemnity for all the costs, charges, and expenses by him expended or incurred in, about, or for the purposes of the action, unless the court or a judge thereof shall direct that costs of the ordinary amount only shall be allowed.

The former costs include "all the costs, charges, and expenses," as between attorney and client; and the latter, the "costs of the ordinary amount only," as between party and party.

A Plaintiff suing for a Penalty may be compelled to give Security for Costs.

24. In any action which any person shall, under the provisions of this act, commence as plaintiff for or on behalf of Her Majesty for recovering any penalty or sum of money, if it shall be shown to the satisfaction of the court or a judge thereof that the person suing as plaintiff for or on behalf of Her Majesty has no ground for alleging that he has been aggrieved by the committing of the alleged offence in respect of which the penalty or sum of money is alleged to have become payable, and also that the person so suing as plaintiff is not

resident within the jurisdiction of the court, or not a person of sufficient property to be able to pay any costs which the defendant may recover in the action, the court or judge shall or may order that the plaintiff shall give security (v) by the bond or recognizance of himself and a surety, or by the deposit of a sum of money, or otherwise, as the court or judge shall think fit, for the payment to the defendant of any costs (z) which he may be entitled to recover in the action.

(v) "Shall give security."—An application to compel the plaintiff to give security for costs must, in ordinary cases, be made before issue joined" (The New Practice Rules of Hilary Term, 1853. Rule 22).

It must be "shown to the satisfaction" of the court or a judge by affidavits in the usual way. The plaintiff may be compelled to give security for costs in three cases—(1) where he has no ground for alleging that he has been aggrieved; (2) where he is not resident within the jurisdiction of the court; (3) where he has not sufficient property to be able to pay costs to the defendant. The court will stay the plaintiff's proceedings until he give the security.

(z) "Any costs."—The "costs" which the defendant "may be entitled to recover in the action" include "all the costs, charges, and expenses" mentioned in sect. 23.

Act not to affect the Corporation of Cutlers of Hallamshire nor to repeal 59 G. 3, c. 7.

25. Nothing in this act contained shall be construed to affect the rights and privileges of the Corporation of Cutlers of the liberty of Hallamshire in the county of York, nor shall anything in this act contained be construed in any way to

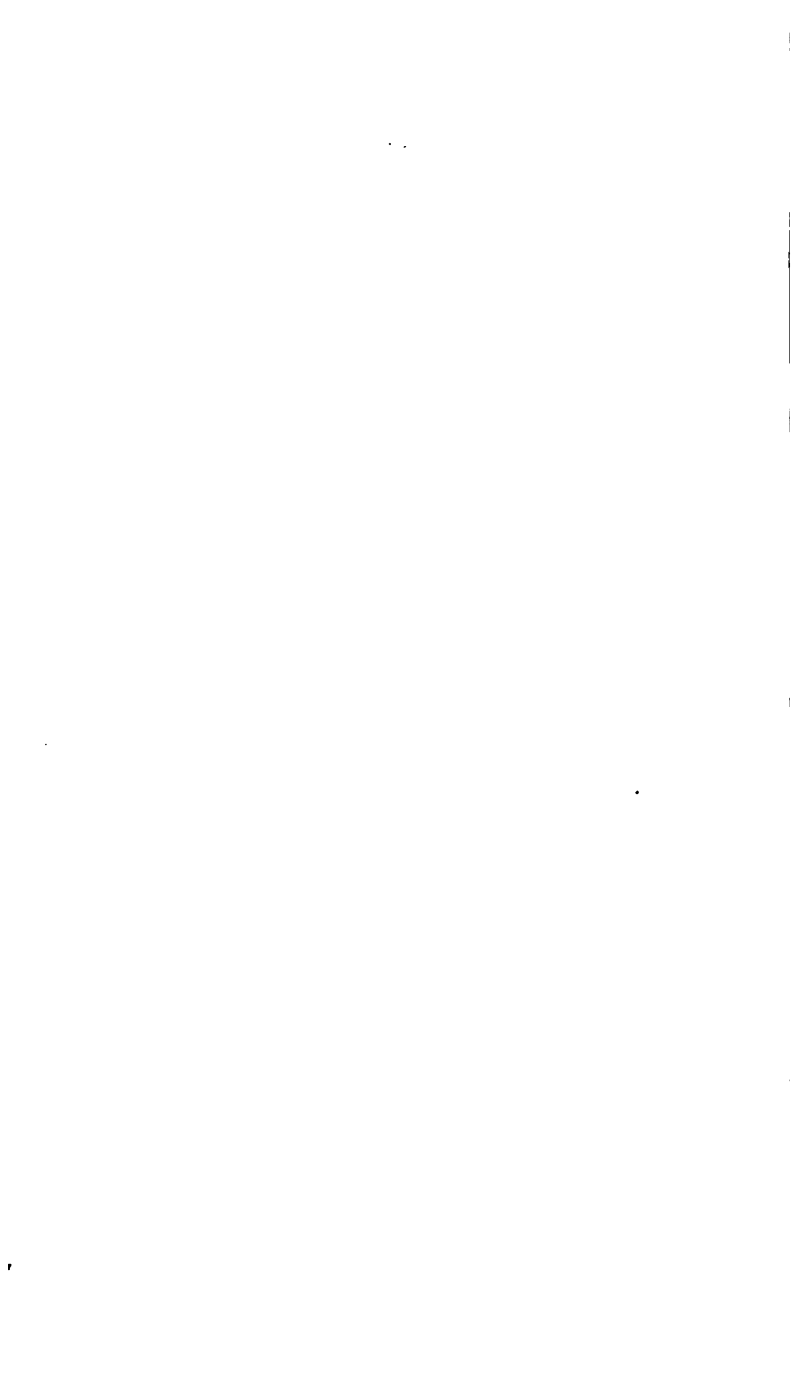
repeal or make void any of the provisions contained in the fifty-ninth George Third, chapter seven, intituled *An Act to regulate the Cutlery Trade in England*.

Persons desirous of ascertaining what the rights and privileges of the corporation of cutlers are will find an account of them in the Blue Book published in May last, entitled, "Report Trade Marks Bill and Merchandise Marks Bill."

Short Title.

26. The expression "The Merchandise Marks Act, 1862," shall be a sufficient description of this act.

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